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No. 1000

In the Supreme Court of the United States

OCTOBER TERM, 1964

CLARENCE H. McKINLEY,
Appellant,

vs.

CHRIS A. REILLY, C. STANLEY CLEGG, and HUGH DUGAN, as Members of the Arizona State Board of Funeral Directors and Embalmers,
Appellees.

On Appeal from the Supreme Court of Arizona

Appellees' Motion to Dismiss

PREFATORY NOTE

Appellant and appellees will generally be referred to herein as McKinley and the Board. References to the Jurisdictional Statement will be by "J.S."

MOTION TO DISMISS

Appellees, Chris A. Reilly, C. Stanley Clegg, and Hugh Dugan, as members of the Arizona State Board of Funeral Directors and Embalmers, hereby move that the appeal of Clarence H. McKinley in the above matter will be dismissed pursuant to Rule 16(b) of the Revised Rules of this Court

on the ground that the appeal does not present a substantial federal question.

ARGUMENT

I. Introduction.

The Jurisditional Statement presented to the Court is littered with various arguments, ideas and conclusions which cannot be legitimately derived from the record or from the Arizona Supreme Court opinion in this case. Unfortunately, the format of the Jurisdictional Statement is such that substance and speculation are often indistinguishable, and the one real question presented by the case is sometimes obscured by legal cliche's and discussion of spurious issues.

It is thus necessary in the presentation of the Argument supporting the Board's Motion to Dismiss that the questions on appeal be defined with some degree of clarity. This will be done by dividing the Argument into two parts, the first dealing with the "Equal Protection" phase of the case, and the second with the "Due Process" question.

A number of contentions made in the Jurisditional Statement will not be mentioned herein. This concession to brevity by the Board should not be construed as a concession of the accuracy of such assertions. Rather, it is the result of a conscious effort to present the Argument supporting the Motion to Dismiss with some degree of order.

II. The Non-Existent Equal Protection Issue.

Although the Jurisdictional Statement uses the term, "equal protection," in shotgun fashion, no question is presented in this case involving the Equal Protection of the Fourteenth Amendment. The equal protection aspect of the case arose from McKinley's argument that *A.R.S.* 32-1337, allowing the issuance of a funeral director's license

to the widow of a funeral director who is not an embalmer, or to an estate of a deceased funeral director (J.S. 4), is violative of the Fourteenth Amendment. The alleged unconstitutionality of the so-called "widow's exemption" was claimed by McKinley to support his position that *A.R.S.* 32-1330, requiring a funeral director to be a licensed embalmer (J.S. 4), was unconstitutional.

The Arizona Supreme Court disposed of McKinley's argument summarily:

> "Petitioner argues that the unconstitutionality of subsection 2 of A.R.S. § 32-1330 is exemplified by the ludicrous provision (A.R.S. § 32-1337) exempting spouses and legal representatives from obtaining embalmers' licenses in order to become funeral directors.'
>
> * * * * * * *
>
> "We first observe the general rule that only those who are injured by the unconstitutional provision of a statute may raise an objection as to its constitutionality. Town of South Tucson v. Board of Supervisors, 52 Ariz. 575, 84 P.2d 581. Assuming, but not deciding, that the exceptions carved out of A.R.S. § 32-1330 by § 32-1337 are arbitrary and without a reasonable basis, the favoritism on behalf of the widows and estates of deceased funeral directors would not be grounds for petitioner to attack the constitutionality of A.R.S. § 32-1330. *Hence we do not reach the constitutionality of A.R.S. § 32-1337.*" (J.S. A9) (Emphasis added)

Thus, the validity and effect of *A.R.S.* 32-1337 as an exception to *A.R.S.* 32-1330 was not decided by the Arizona Supreme Court, and cannot be considered by this Court under the rule of *Asbury Hospital v. Cass County, North Dakota*, 326 U.S. 207, 215, 66 S.Ct. 61, 90 L.Ed. 6 (1945):

> "* * * a constitutional question which turns on the construction and application of a statute which has neither been authoritatively construed nor applied by

the state courts may not appropriately be decided by this Court.".

Even if it is assumed in a vacuum that *A.R.S.* 32-1337 authorizes a special class of licensed funeral directors in violation of the Fourteenth Amendment, the removal of that section from Title 32, Chapter 12 of the Arizona Revised Statutes leaves a completely workable licensing and regulatory system. Under Arizona decisions,* the remaining portion of the Funeral Directors and Embalmers Law of 1945 would not be affected by the striking of *A.R.S.* 32-1337:

> "This court on numerous occasions has held that if part of an act is unconstitutional and by eliminating the unconstitutional portion the balance of the act is workable, only that part which is objectionable will be eliminated and the balance left intact. Gherna v. State, 16 Ariz. 344, 146 P. 494; Millett v. Frohmiller, 66 Ariz. 339, 188 P.2d 457." (*State v. Coursey*, 71 Ariz. 227, 225 P.2d 713, 719 (1950))

See also: *Scottish Union & National Ins. Co. v. Phoenix Title & Trust Co.*, 28 Ariz. 22, 235 P. 137 (1925); *Ogelsby v. Pacific Finance Corporation*, 44 Ariz. 449, 38 P.2d 646 (1934). An invalid provision of an act relating to administrative agencies may be severed if the remaining portion of the act is workable. *State v. Marana Plantations*, 75 Ariz. 111, 252 P.2d 87 (1953).

An examination of Title 32, Chapter 12, Article 2 of the Arizona Revised Statutes makes it obvious that a complete act would remain if *A.R.S.* 32-1337 were lifted bodily out of the books. Mr. McKinley's status would be unchanged if

*The severability of a void section of a state law is determined under state law. *Dorchy v. State of Kansas*, 264 U.S. 286, 44 S.Ct. 323, 68 L.Ed. 686 (1924).

A.R.S. 32-1337 did not exist, or if it were never mentioned in this case. Whether *A.R.S.* 32-1337 does nor does not create a "privileged class" of funeral directors exempt from licensing requirements under *A.R.S.* 32-1330 is of no consequence in this action.

The issue as to the validity of *A.R.S.* 32-1337 is really nothing more than an abstract exercise by McKinley, the presentation of which must be rejected under the basic rule that this Court will not decide constitutional questions as to the validity of a state statute unless the necessity for such decision arises in the record. *Arkansas Fuel Oil Co. v. State of Louisiana,* 304 U.S. 197, 58 S.Ct. 832, 82 L.Ed. 1287 (1938). In essence, the Equal Protection "question" involving *A.R.S.* 32-1337 does not present a real case or controversy for determination under Article III, Section 2 of the Constitution.

III. The Significance of the Due Process Question.

It is unquestioned in this case by McKinley that persons providing funeral services are subject to regulation by the State of Arizona.* McKinley's complaints involve only the manner in which this regulation is accomplished, and more specifically, the validity of the following provision of *A.R.S.* 32-1330 under the Due Process clause of the Fourteenth Amendment:

---

*A contention that the State of Arizona cannot regulate such activities would be untenable. Every state in the United States has adopted legislation which in some way regulates persons providing funerals. The constitutionality of such regulation has been universally upheld in the state courts, and was again approved in this case by the Arizona Supreme Court. (J.S. A3, citing 89 A.L.R.2d 1338, 1342-1343) This court has, by implication if not directly, approved such regulation in *Daniel v. Family Security Life Ins. Co.*, 336 U.S. 220, 69 S.Ct. 550, 93 L.Ed. 632 (1949).

"A. An applicant for a certificate of qualification as a funeral director shall set forth in his application that he is twenty-one years of age or over, a resident of this state and of good moral character. The application shall also show that the applicant:

. . . . . .

"2. Has been, for not less than one year previous to the filing of his application, a qualified practicing embalmer associated with a qualified practicing funeral director."

Reduced to its simplest terms, the question presented is whether the State of Arizona may, consistent with the Fourteenth Amendment, require a funeral director to be a licensed embalmer?

An understanding of this question necessarily requires some definitions of terms and explanation of the regulatory system adopted in Arizona. *A.R.S.* 32-1301 provides:

"In this chapter, unless the context otherwise requires:

. . . . . .

"6. 'Funeral directing' means the business or profession, for profit, of disposing of dead human bodies, or of maintaining a funeral establishment.

"7. 'Funeral director' means a person engaged in funeral directing or in the management of a funeral establishment."

As the Arizona Supreme Court stated in this case:

"A funeral director in Arizona is a person engaged in the management of a funeral establishment. The business of funeral directing is the business or profession of disposing of dead human bodies. A funeral director, therefore, is the person responsible for the supervision and operation of a business disposing dead human bodies." (J.S. A6)

Contrary to several statements made to this Court by McKinley (J.S. 9, 12), the Arizona Supreme Court did not rule that an *owner* of a funeral establishment must be a funeral director, nor do the licensing provisions of Arizona law operate with regard to ownership. All the law requires is that a person engaged in actual management of this establishment hold a funeral director's license, and that a funeral director who is, by definition, engaged in disposing of dead human bodies, hold an embalmer's license.

McKinley's attack on the licensing requirements of *A.R.S.* 32-1330 appeals to an outmoded concept of substantive due process of law with the contention that the State of Arizona has thwarted the business of funeral directing by legislation which is "arbitrary" and "without substantial reasonable relation" to the public interest. (J.S. 5) McKinley also expostulates that funeral directing is a competitive "business" rather than a "profession," which cannot be restricted by the State of Arizona when adequate protection of the public health is provided by other laws of the State. (J.S. 10-11)

These contentions are founded on cases such as *Liggett Co. v. Baldridge*, 278 U.S. 105, 49 S.Ct. 57, 73 L.Ed. 204 (1928) (J.S. 3, 10, 11), which held that the State of Pennsylvania could not require every stockholder in a drug store to hold a pharmacist's license. The *Liggett* case was analysed in *Daniel v. Family Security Life Ins. Co.*, supra:

> "According to the majority in Liggett, 'A state cannot, "under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them."' 278 U.S. at page 113, 49 S. Ct. at page 59, 73 L.Ed. 204. But a pronounced shift of emphasis since the Liggett case has deprived the words 'unreasonable' and 'arbitrary' of the content for

which respondents contend. See Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 69 S.Ct. 251; where the cases are reviewed."

Other decisions from this Court relied upon by McKinley are similarly without contemporary significance.* The concept of Due Process for which those cases stood is primarily of only historical interest.

"* * * Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy.

* * * * * * * *

"The doctrine that prevailed in Lochner, Coppage, Adkins, Burns, and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, 'We are not concerned . . . with the wisdom, need, or

Lochner v. New York, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905) (J.S. 3, 10) held that a state could not limit bakery employees to working a 60 hour week and a 10 hour day; *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, 22 S.Ct. 431, 46 L.Ed. 679 (1901) (J.S. 3, 12) held a state anti-trust law unconstitutional, and was, for all practical purposes, overruled in *Tigner v. Texas*, 310 U.S. 141, 60 S.Ct. 879, 84 L.Ed. 1124 (1940); *Thornhill v. Alabama*, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940) (J.S. 3, 17) involved a picketing and loitering law, and has no rational application to this case; *Smith v. Texas*, 233 U.S. 630, 34 S.Ct. 681, 58 L.Ed. 1129 (1914) (J.S. 3) ruled a state law requiring a railroad conductor to have two years experience on freight trains to be violative of the Fourteenth Amendment.

> appropriateness of the legislation.' Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to 'subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.' It is now settled that States 'have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.'
>
> . . . . . .
>
> We refuse to sit as a 'superlegislature to weigh the wisdom of legislation,' and we emphatically refuse to go back to the time when courts used the Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.' Nor are we able or willing to draw lines by calling a law 'prohibitory' or 'regulatory.' Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours." *Ferguson v. Skrupa*, 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93, 95 A.L.R.2d 1347 (1963)

The crux of McKinley's case is also founded on his disagreement with the statutory definitions of "funeral director" and "funeral directing" in *A.R.S.* 32-1301. Contrary to the statutory provision that funeral directing is a "business or profession," and the Arizona Supreme Court's statement that funeral directing is more a profession than a business (J.S. A7), McKinley asserts that funeral directing is a business in which he has an inherent right to engage. What McKinley ignores (and also concedes) is the fact that funeral directing, be it business, profession, vocation, or

industry, involves matters of public interest subject to public regulation. And, as stated in *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955):

> "* * * the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.
>
> "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a potential school of thought." (Citations omitted)

So, by admitting the power of the state to regulate funeral directing, McKinley negates his own claim that his "right" to practice funeral directing cannot be frustrated by the State of Arizona.

Concededly, the question presented by McKinley has been resolved in conflicting ways in different states. Four older cases cited by McKinley (J.S. 20) no longer have meaning in the states where they arose.* Two decisions, *Cleere v. Bullock*, 146 Colo. 284, 361 P.2d 616 (1961), and *Gholson v. Engle*, 9 Ill. 2d 454, 138 N.E.2d 508 (1956), were discussed and disapproved by the Arizona Supreme Court in this case. (J.S. A7-8) On the other side of the ledger are *Vaughn v. State Board*, 196 Va. 141, 82 S.E.2d 618 (1954), and *State*

Wyeth v. Thomas, 200 Mass. 474, 86 N.E. 925 (1909), has been nullified by Chap. 112, § 83, *Ann. Laws Mass.*; *People v. Ringe*, 197 N.Y. 143, 90 N.E. 451 (1910) is no longer of meaning under *New York Health Law* § 3400; Art. 43, § 346 *Ann. Code Md.*, has in effect overruled *State v. Rice*, 115 Md. 317, 80 A. 1026 (1912); and *State v. Whyte*, 177 Wis. 541, 188 N.W. 607 (1922) is of no application in view of *Wis. Stat. Ann.*, § 156.045.

Board of Funeral Directors & Embalmers v. Cooksey, 147 Fla. 337, 3 So.2d 502 (1941).

The divergence of opinion among the states on the question presented does not make the question more substantial. Regulatory systems, definitions, and terminology involved vary greatly in different states. What is here involved is only the Arizona law, and its interpretation and application by the Arizona Supreme Court.

Disposition of the question on appeal is governed by the time honored concept of *Dent v. West Virginia*, 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623 (1888), as quoted in *Graves v. Minnesota*, 272 U.S. 425, 47 S.Ct. 122, 71 L.Ed. 331 (1926):

> "In the Dent case this court said: 'The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud. As one means to this end it has been the practice of different states, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely, their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific and otherwise, with which such pursuits have to deal. The nature and extent of the qualifications must depend primarily upon the judgment of the state as to their necessity."

It is apparent on the face of the Jurisdictional Statement that McKinley's quarrel is with the wisdom and judgment of the Arizona Legislature. Under the *Dent* concept, as applied by this Court during the past twenty years, the

desirability or logic of the Arizona Legislature's prescribing minimum qualifications for persons engaged in funeral directing does not present a matter of such concern as to require the exercise of jurisdiction by this Court. See: *Martin v. Walton*, 368 U.S. 25, 82 S.Ct. 1, 7 L.Ed.2d 5 (1961), and cases there cited.

CONCLUSION

The scope and tenor of the Jurisdictional Statement is exemplified by McKinley's concluding assertion that the entire act governing funeral directors and embalmers in Arizona is unconstitutional, a conclusion founded on continuous and redundant references to "class legislation," "special immunities," "arbitrary legislation," and "fundamental liberties." Nowhere are these fine words and sweeping claims translated into concrete application under the subsisting concepts of the Due Process clause. Nowhere does the Jurisdictional Statement explain McKinley's argument that there is no relationship between embalming and the work by a funeral director. Nowhere is the significance of this case demonstrated in the Jurisdictional Statement. McKinley's facade of generalized bravado does not obscure the fact that this is only another case in which an appellant is disputing the propriety of a licensing law which does not meet the appellant's standard of mediocrity.

Any illusion of significance engendered by McKinley's characterization of this case as a matter of first impression is readily dispelled by the opinion of the Arizona Supreme Court applying principles of constitutional law which are well-established by this Court. Any appeal to the Equal Protection clause is similarly without materiality in the absence of a legitimate equal protection issue. Any discus-

sion of the Due Process question can only lead to the conclusion that the question is of no more than passing interest.

In the absence of a substantial question involving the application of the Fourteenth Amendment in this case, it is urged that the appeal be dismissed.

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